No. 84-231 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALVIN D. HOOPER and MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

On Appeal from the Court of Appeals of the State of New Mexico

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BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE BERNALILLO COUNTY ASSESSOR

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INTEREST OF AMICUS CURIAE

The State of New Mexico (state), on behalf of the Taxation and Revenue Department (department) joins in this appeal as amicus curiae to support the position of appellee, the Bernalillo County Assessor (assessor). The interest of the state in this case derives from the department's responsibility to uphold the New Mexico Property Tax Code (Code). Sections 7-35-1 and 7-35-3 NMSA 1978.

The state joins in this case, as it participated as amicus curiae in the New Mexico Court of Appeals, in support of the statutory definition of veteran found in § 7-37-5(C) NMSA 1978. *Hooper v. Bernalillo County Assessor*, 101 N.M. 172, 679 P.2d 840 (Ct.App. 1984), *cert. denied*, 101 N.M. 77, 678 P.2d 705 (1984). The state asserts that this statute is a constitutional method of rewarding New Mexico war veterans and that the challenged portion of the definition of veteran cannot be severed from the exemption as a whole.

SUMMARY OF ARGUMENT

The definition of veteran in the veteran property tax exemption, § 7-37-5(C) NMSA 1978, does not substantially interfere with the right to travel and therefore is constitutional because there is a rational basis for the different treatment accorded to the persons affected by the statute. New Mexico's veteran property tax exemption is a reasonable method for rewarding New Mexico residents who served this country during times of armed conflict.

If this Court finds that the exemption does not meet equal protection standards, the case should be remanded to the state court to determine if the offending portion of the statute is severable. In the alternative, if this Court reaches the severability issue, the entire statutory exemption must be invalidated. State law precludes broadening the application of the tax exemption, which would be the effect of severing the definition from the statute as a whole.

POINT I

THE STATUTORY DEFINITION OF VETERAN MEETS EQUAL PROTECTION STANDARDS BECAUSE REWARDING A STATE'S OWN VETERANS IS A RATIONAL PURPOSE.

Appellant property owner argues that the statutory definition of veteran violates the equal protection provision of the federal constitution. This definition limits

the grant of the exemption to those veterans who were residents prior to induction, who became residents after induction but before active tour of duty or who became residents within an established period following the cessation of conflict. While the statute does create two classes of persons accorded different treatment, this classification is reasonable and therefore is not a denial of equal protection. *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947).

A. The validity of the definition of veteran is to be determined under the rational basis standard.

Determination of the constitutionality of the veteran tax exemption requires a two step analysis: first, what standard is to be applied to determine if equal protection has been denied and, second, whether that standard has been transgressed. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

As this Court has held, a statute imposing a residency requirement will be examined under the strict scrutiny test only if it impairs a person's ability to function and thus substantially interferes with the right to travel; otherwise it will be judged by the rational basis standard. *Shapiro v. Thompson*, 394 U.S. 618 (1969). All residency requirements may interfere to some degree with migration. *Dunn v. Blumstein*, 405 U.S. at 342, n. 13 (1972). But not every statute which has an adverse impact on a person who has exercised the right to travel is subject to strict scrutiny.

> The amount of impact required to give rise to the compelling-state-interest test was not made clear [in *Shapiro v. Thompson*]. The Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration . . . . Second, the Court considered the extent to which the residence requirement served to *penalize* the exercise of the right to travel.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-57 (1974) (emphasis in original).

A finding that the fundamental right to travel had been violated invoked the strict scrutiny standard in *Shapiro, Dunn* and *Memorial Hospital* because of the severity of the penalty intrinsic to the operation of the residency requirement. In each of those cases the application of the residency requirement resulted in a denial of benefits which were essential to a resident's ability to function as a citizen—welfare benefits, the right to vote and medical assistance for an indigent. This combination of a residency requirement and the denial of a benefit of vital importance triggered the finding that the fundamental right to travel was infringed; the residency requirement alone did not constitute the prohibited infringement.

In contrast, the rational basis test applies when the residency requirement affects a benefit that does not substantially impair a new resident's ability to function as a citizen. *See Memorial Hospital v. Maricopa County, supra.* This Court has endorsed the application of the rational basis standard to residency requirements which may inconvenience but do not deprive a citizen of a significant state benefit. *Starns v. Malkerson,* 401 U.S. 985 (1971), *affirming* 326 F.Supp. 234 (D.Minn. 1970).

Whatever effect on the right to travel the New Mexico veteran exemption may have, it does not rise to the level of a penalty. Comparing *Shapiro, Dunn,* and *Memorial Hospital* to the facts of this case, it is clear that the property owner is not deprived of a life sustaining or other vital benefit by having established New Mexico residence after May 8, 1976. An exemption from taxation of a maximum of $2,000 of property is more closely analogous to the benefit of in-state tuition, *Starns v. Malkerson, supra,* than to welfare benefits, medical assistance or voting rights. The grant or denial of the property tax exemption has little financial impact on a veteran moving to

New Mexico.[1] To qualify for the exemption a veteran must own real property. Persons with the financial capability to purchase real property are not likely to be substantially penalized by the denial of this property tax exemption.

Finally, the challenged statute is a tax exemption—a legislative gratuity in which no rights vest. *Murphy v. Taxation and Revenue Department,* 94 N.M. 90, 607 P.2d 628 (Ct.App. 1979). As such it could be reversed or withdrawn at any time. Therefore, in deciding whether to travel or not to travel, any reliance on the grant of the exemption would be misplaced. Because the fundamental right to travel is not substantially infringed by the residency requirement in § 7-37-5(C) NMSA 1978, the standard by which to judge the statute is whether a rational basis exists for the creation of two classes.

B. Section 7-37-5 NMSA 1978 has a rational basis.

New Mexico's veteran tax exemption meets the rational basis standard because the statute serves a legitimate governmental goal. The intent of § 7-37-5(C) is to reward persons who served in periods of armed conflict as residents of New Mexico or who established residency in New Mexico shortly thereafter.

The contributions which New Mexico recognizes through its veteran tax exemption are actual, tangible contributions of wartime military service. Though this Court has not yet ruled on the point, goals similar to New Mexico's have been found to have a rational relation to veteran preference statutes by various other courts. *Langston v. Levitt,* 425 F.Supp. 642 (S.D.N.Y. 1977). As explained in the lower court's opinion in *August v. Bronstein,* 369 F.Supp. 190 (S.D.N.Y.), *aff'd,* 417 U.S. 901 (1974):

[1] Translated into cash value the veteran exemption is worth a maximum of $106 per year to a property owner when the tax rate of .053 is multiplied by the exemption amount of $2,000.

> The preference is a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the state thereafter. . . .
>
> Clearly, the modest veterans' preference at issue here is substantially related to the purposes of the state.

369 F.Supp. at 193. *Accord Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980); *Miller v. Board of County Commissioners of Natrona County*, 337 P.2d 262 (Wyo. 1959).

Appellant contends that *Zobel v. Williams*, 457 U.S. 55 (1982), controls this case. The reason for rewarding New Mexico resident veterans is not the same as the purpose of the Alaskan benefit which was found invalid in *Zobel*. New Mexico rewards its veterans for actual, positive contributions to the military effort; service during periods of conflict and an honorable discharge are necessary to qualify for the exemption. These services differ drastically from the undefined, intangible and perhaps nonexistent contributions made by Alaska's citizens through their mere presence in the state.

Like the statutes at issue in the above cited cases, the veteran tax exemption is basically restricted to persons who were residents of New Mexico while serving in the military. The statute includes an additional period to allow individuals to claim the exemption when residency is established within a short period following the conflict for which the veteran's status is claimed. As explained in detail in appellee Bernalillo County Assessor's Reply Brief, the statute has a rational basis. Amicus adopts and will not repeat that argument.

In summary, the residency requirement of the veteran tax exemption does not have an impact on the right to travel by impairing a citizen's access to life-sustaining or other necessities. Because the infringement is not critical, the statute is to be judged by the rational basis standard. The veteran's tax exemption meets this test by devising a reasonable method of rewarding New Mexico's veterans.

POINT II

THE DEFINITION OF VETERAN CANNOT BE SEVERED FROM THE STATUTE BECAUSE IT IS INTEGRAL TO THE GRANT OF THE EXEMPTION.

The appellant has requested this Court to rule that the portion of the statute which requires a veteran to establish residency by a given date can be severed from the statute so that the exemption continues with a broadened scope. The state asserts that this result is not supported by law.

If this Court finds that the residency requirement of the veteran property tax exemption is unconstitutional, this case should be remanded to the New Mexico Court of Appeals to determine whether the residency requirement can be severed from the statute as a whole. *Zobel v. Williams*, 457 U.S. 55 (1982). The issue of the severability of the statute hinges on state created rights, and therefore is a state law question. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1933).

If the Court decides to resolve the severability issue itself it should rule against severability. Under applicable New Mexico legal precedent, because the definition of veteran which contains the residency requirement is integral to the exemption, it cannot be separated from the statute. New Mexico law provides a three-pronged test for determining if an act is severable. That test is:

> First, the invalid portion must be able to be separated from the other portions without impairing their effect. Second, the legislative purpose expressed in the valid portion of the act must be able to be given effect without the invalid portion. And, thirdly, it cannot be said, on a consideration of the whole act,

that the legislature would not have passed the valid part if it had known that the objectionable part was invalid.

State v. Spearman, 84 N.M. 366, 368, 503 P.2d 649 (Ct.App. 1972). The veteran property tax exemption does not survive this test—severance would undermine the operation and be inconsistent with the legislative purpose of the statute.

The requirement that residency be established by the dates designated in the statute cannot be separated from the exemption as a whole because such severance would judicially expand the grant of the exemption to a broader class of persons. The purpose of an exemption is to grant a benefit to a special group of persons; essential to the operation of an exemption are the parameters of the class of recipients. *See McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). Because the grant of the exemption is integrally connected to the factors which determine those eligible for it, the definition of the class cannot be separated from the exemption as a whole without substantially changing the effect of the statute.

This conclusion is supported by *Safeway Stores v. Vigil*, 40 N.M. 190, 57 P.2d 287 (1936), where the portion of a tax statute which defined the class of taxpayers was found unconstitutional. The New Mexico Supreme Court in *Safeway Stores* found that the statutory definition of retail dealer was arbitrary in that it resulted in taxing only merchants who sold goods in small parcels and exempted those whose merchandise was not so contained. The operation of the tax statute was determined to be dependent on the meaning of retail dealer. Therefore the whole act was found invalid when the court found that the definition violated equal protection standards.

In this case, the challenged portion of § 7-37-5(C) NMSA 1978 has the effect of limiting the class of persons eligible for the veteran exemption. Therefore, the intent of the legislature, as determined from the language of the statute, is to confine the grant of the exemption to persons who were residents of New Mexico at a time closely associated with their military service during war. If this Court were to delete the contested language from the statute, the result would be that persons who the legislature specifically excluded from the grant of the exemption would receive such benefits. This would be contrary to the express legislative intent and would impair the budgets of county governments by creating a tax exemption substantially beyond the scope anticipated by the legislature.

Severability is also unwarranted because the full text of § 7-37-5 NMSA 1978 reveals no support for an assertion that the legislature would have enacted the veteran exemption without the challenged residency requirement. The text of the veteran exemption very clearly designates the dates by which a person claiming the exemption must have established residency in New Mexico. There is nothing in the statute which suggests that this requirement is dispensable. To the contrary, since 1933 the statutory amendments evidence inclusion of this or a similar residency requirement. *Flaska v. State*, 51 N.M. 13, 177 P.2d 174 (1946). Coupled with these facts is the consistent legal authority stating that legislative intent to create a tax exemption is never presumed but must be expressed in clear and unambiguous language. *McClanahan v. State Tax Commission of Arizona, supra.* No grounds exist to presume that the legislature would be willing to exempt from taxation the property of persons other than those specified in the statute.

In conclusion, if this Court finds a denial of equal protection, this case should be remanded to the state court to apply the appropriate remedy. Even if the Court does not remand the case, it should rule against severability. New Mexico laws would, under these circumstances, in-

validate the entire veteran exemption. Any other result would have the effect of a legislative act since a group of persons previously denied an exemption by the legislature would henceforth be entitled to one.

CONCLUSION

The state asserts that the definition of veteran found in § 7-37-5(C) is a rational method of rewarding persons who served this country on behalf of New Mexico. If this Court finds that the criteria for qualifying for the veteran tax exemption is unconstitutional, the case should be remanded to the state court or the exemption should be ordered invalid in its entirety.

Respectfully submitted,

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